



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Areawide Services, Inc.

File: B-225253

Date: February 9, 1987

DIGEST

1. Where agency amends solicitation to remove a provision as protester requested, protest based on that provision is academic.
2. Protest that requirement for bid and performance bonds is unduly restrictive is without merit since it is within the agency's discretion whether to require bonding in a solicitation and General Accounting Office will not upset such a determination made reasonably and in good faith.
3. There is no requirement that there be a history of performance problems before a performance bond may be required.
4. An issue which is first raised in a protester's comments on an agency's report must independently meet timeliness requirements of Bid Protest Regulations.

DECISION

Areawide Services, Inc. (Areawide), protests the allegedly restrictive provisions of invitation for bids (IFB) No. GS11P86MJC0131, a small business set-aside, issued by the General Services Administration (GSA), for security guard services at the Casimir Pulaski Building in Washington, D.C. The grounds of the protest are that the solicitation improperly included a requirement that bidders obtain a minimum secret security clearance by the time of bid opening and requirements for bid and performance bonds.

We dismiss the protest in part and deny it in part.

038007

The solicitation, issued on October 10, 1986, required all prospective bidders to provide a bid bond equal to 20 percent of the first year contract price at the time of bid opening and a performance bond equal to 20 percent of the first year contract price prior to award. In addition, the solicitation required bidders to possess a minimum secret security clearance. Bid opening was scheduled for November 24.

By letter of protest to this Office received November 21, Areawide objected to the bonding and security clearance requirements of the solicitation. Shortly before the time originally set for bid opening, the contracting officer notified all prospective bidders telephonically of an amendment to the solicitation, which deleted the security clearance requirement of the solicitation and extended the date for bid opening to December 10. The amendment is memorialized in a writing dated November 28. We note as well that on December 10, some 7 bids were received; Areawide failed to bid upon the solicitation, allegedly because it was unable to obtain the required bonding.

Since the November 28 amendment removes the security clearance requirement from the solicitation, thus satisfying the concerns of the protester, we dismiss this aspect of the protest as academic. IBI Security Service, Inc., B-217444, Aug. 19, 1985, 85-2 C.P.D. ¶ 189. -

As to the propriety of the bonding requirements, Areawide argues primarily that these requirements were unreasonable and unduly restricted competition from small businesses. Specifically, the protester alleges that many government agencies have acquired security guard services without requiring performance or bid bonds; that GSA has not pointed to a history of contractor default in previous contracts for these security services and that the awardee under this contract will not be entrusted with an amount of government property significant enough to warrant the bonding requirements of this solicitation.^{1/} Areawide argues, moreover, that contractor responsibility can be established by a preaward survey, thus obviating the need for the bonding requirements.

^{1/} Under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 28.103-2(a) (1986), entrusting a contractor with government property is one of four articulated circumstances where the imposition of a performance bond is suggested as in the government's interest.

The agency responds that the contracting office reasonably determined that the bonding requirements of this solicitation were in the best interest of the government and Areawide has not met its burden of demonstrating that this determination was made unreasonably or in bad faith; that even if competition may have been restricted, the bonding requirements were necessary to secure the fulfillment of the contractor's obligations; that government property will be provided to the contractor under the contract and that it need not point to a history of contractor nonperformance in order to reasonably impose bonding requirements.

We have consistently held that performance bond requirements, although they may result in a restriction of competition, are a necessary and proper means of securing to the government fulfillment of a contractor's obligations under a contract. D. J. Findley, Inc., B-221096, Feb. 3, 1986, 86-1 C.P.D.

¶ 121. Although as a general rule, in the case of nonconstruction contracts, agencies are admonished against the use of performance bonds, see FAR, 48 C.F.R. § 28.103-1(a), the use of a performance bond is permissible where such a bond is needed to protect the government's interest. This is so whether or not the agency's rationale for imposing a performance bond requirement comes within the four articulated circumstances for a performance bond in the FAR, 48 C.F.R. § 28.103-2(a). Professional Window and Housecleaning, Inc., B-224187, Jan. 23, 1987, 87-1 C.P.D. ¶ ____.

In reviewing a challenge to the imposition of a bonding requirement, we look to see whether the requirement is reasonable and imposed in good faith; the protester bears the burden of establishing unreasonableness or bad faith. See D. J. Findley, Inc., B-221096, supra.

In a memorandum for the record dated October 6, the contracting officer states, as one rationale for including a performance bond requirement, the following:

"Historical data from bid abstracts reveals that a significant percentage of bidders in the low price range have submitted bids at or below cost. This results in one (1) to three (3) bid verification requests by the Contracting Officer for each solicitation. Once a bid is challenged and the bidder verifies its bid, the award cannot be denied simply because it chooses to bid at a loss. . . . Thus, the risk of performance is substantial and the Government must have bonding protection."

We cannot say that this rationale is unreasonable or put forth in bad faith, and the protester has offered no

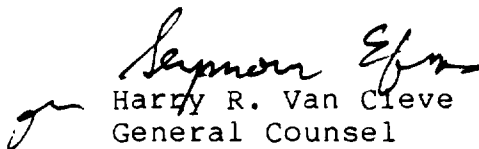
substantive evidence to the contrary. Moreover, there is no requirement that there be a history of performance problems before performance bonds may be required. Intelcom Support Services, Inc., B-222560, July 18, 1986, 86-2 C.P.D. ¶ 82. Finally, we do not agree with protester's assertion that a preaward survey obviates the need for a performance bond. A preaward survey is an evaluation of a prospective contractor's capability to perform a proposed contract. It does not offer the procuring agency any legal protection in case of default after award has been made as does a performance bond. See generally Harris Systems International, Inc., B-219763, Oct. 18, 1985, 85-2 C.P.D. ¶ 423. We therefore find that the imposition of a performance bond requirement was reasonable in this solicitation and accordingly deny this basis of protest.

As to the bid bond, the FAR, 48 C.F.R. § 28.101-1(a), states, "The use of bid guarantees shall be required only when a performance bond . . . is required." Having found the performance bond in this solicitation proper, we also conclude that the agency properly included a bid bond in the solicitation.

As a final matter, in its comments upon the agency's report, Areawide alleges that the contracting officer should have negotiated this procurement rather than solicit sealed bids. This argument is untimely raised.

Protest arguments not raised in a protester's initial submission must independently satisfy the timeliness requirements of our Bid Protest Regulations, 4 C.F.R. § 21.2 (1986); Radionic Hi-Tech, Inc., B-219116, Aug. 26, 1985, 85-2 C.P.D. ¶ 230. Since this basis of protest is an alleged impropriety apparent upon the face of the solicitation, it was necessary for Areawide to file a protest in this Office upon this ground prior to the December 10 bid opening. Areawide's comments, in which it raises this issue, were filed with our Office on December 29; this basis of protest is therefore dismissed as untimely pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1).

The protest is dismissed in part and denied in part.


Harry R. Van Cleave
General Counsel